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CIVIL LAW ISSUES

REPUBLICAN PARTY OF MINNESOTA v. WHITE, No. 01-521, __U.S. __ (June 27, 2002). SCALIA, J.

The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.

Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election. Minn. Const., Art. VI, § 7. Since 1912, those elections have been nonpartisan. Act of June 19, ch. 2, 1912 Minn. Laws Special Sess., pp. 4-6. Since 1974, they have been subject to a legal restriction which states that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000). This prohibition, promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, is known as the "announce clause." Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay. Minn. Rules of Board on Judicial Standards 4(a)(6), 11(d) (2002). Lawyers who run for judicial office also must comply with the announce clause. Minn. Rule of Professional Conduct 8.2(b) (2002) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct"). Those who violate it are subject to, *inter alia*, disbarment, suspension, and probation. Rule 8.4(a); Minn. Rules on Lawyers Professional Responsibility 8-14, 15(a) (2002).

In 1996, one of the petitioners, Gregory Wersal, ran for associate justice of the Minnesota Supreme Court. In the course of the campaign, he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion. A complaint against Wersal challenging, among other things, the propriety of this literature was filed with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board, n1 investigates and prosecutes ethical violations of lawyer candidates for judicial office. The Lawyers Board dismissed the complaint; with regard to the charges that his campaign

materials violated the announce clause, it expressed doubt whether the clause could constitutionally be enforced. Nonetheless, fearing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election. In 1998, Wersal ran again for the same office. Early in that race, he sought an advisory opinion from the Lawyers Board with regard to whether it planned to enforce the announce clause. The Lawyers Board responded equivocally, stating that, although it had significant doubts about the constitutionality of the provision, it was unable to answer his question because he had not submitted a list of the announcements he wished to make. [Footonote omitted.]

Shortly thereafter, Wersal filed this lawsuit in Federal District Court against respondents, [Footonote omitted.] seeking, *inter alia*, a declaration that the announce clause violates the First Amendment and an injunction against its enforcement. . . ..

Before considering the constitutionality of the announce clause, we must be clear about its meaning. Its text says that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002).

We know that "announcing . . . views" on an issue covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called "pledges or promises" clause, which *separately* prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," *ibid.* -- a prohibition that is not challenged here and on which we express no view.

. . . .

[I]t is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions -- and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.[5]

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[5] In 1990, in response to concerns that its 1972 Model Canon -- which was the basis for Minnesota's announce clause -- violated the First Amendment, see L. Milord, The Development of the ABA Judicial Code 50 (1992), the ABA replaced that canon with a provision that prohibits a judicial candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA Model Code of Judicial Conduct, Canon 5(A)(3)(d)(ii) (2000). At oral argument, respondents argued that the limiting constructions placed upon Minnesota's announce clause by the Eighth Circuit, and adopted by the Minnesota Supreme Court, render the scope of the clause no broader than the ABA's 1990 canon. Tr. of Oral Arg. 38. This argument is somewhat curious because, based on the same constitutional concerns that had motivated the ABA, the Minnesota Supreme Court was urged to replace the announce clause with the new ABA language, but, unlike other jurisdictions, declined. Final Report of the Advisory Committee to Review the ABA Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards 5-6 (June 29, 1994), reprinted at App. 367-368. The ABA, however, agrees with respondents' position, Brief for ABA as *Amicus Curiae* 5. We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question.

Respondents contend that this still leaves plenty of topics for discussion on the campaign trail. These include a candidate's "character," "education," "work habits," and "how [he] would handle administrative duties if elected." Brief for Respondents 35-36. Indeed, the Judicial Board has printed a list of preap proved questions which judicial candidates are allowed to answer. These include how the candidate feels about cameras in the courtroom, how he would go about reducing the caseload, how the costs of judicial administration can be reduced, and how he proposes to ensure that minorities and women are treated more fairly by the court system. Minnesota State Bar Association Judicial Elections Task Force Report & Recommendations, App. C (June 19, 1997), reprinted at App. 97-103. Whether this list of preapproved subjects, and other topics not prohibited by

the announce clause, adequately fulfill the First Amendment's guarantee of freedom of speech is the question to which we now turn.

As the Court of Appeals recognized, the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is "at the core of our First Amendment freedoms" -- speech about the qualifications of candidates for public office. . . . . The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary. . . . .

One meaning of "impartiality" in the judicial context -- and of course its root meaning -- is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. . . . .

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. . . . .

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. . . . .

A third possible meaning of "impartiality" (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

. . . .

The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. . . . .

. . . The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with *nonpromissory* statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding -- or as more likely to subject him to popular disfavor if reconsidered -- than a carefully considered holding that the judge set forth in an earlier opinion denying some individual's claim to justice.. . ..

Moreover, the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. "Debate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms," not at the edges. . . .

. . . .

. . . Justice Ginsburg greatly exaggerates the difference between judicial and

legislative elections. She asserts that "the rationale underlying unconstrained speech in elections for political office -- that representative government depends on the public's ability to choose agents who will act at its behest -- does not carry over to campaigns for the bench.". *Post*, at 4. This complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well. . . .

. . . .

The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. Accordingly, we reverse the grant of summary judgment to respondents and remand the case for proceedings consistent with this opinion.

REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., concurred.
O'CONNOR, J., and KENNEDY, J., filed concurring opinions.
STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined.
GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined.

HEALTHSCRIPT, INC. v. STATE, No. 49S05-0102-CR-108, ___ N.E.2d ___ (Ind. June 28, 2002).

SULLIVAN, J.

We start with the language of Ind. Code § 35-43-5-7.1(a)(1) (Supp. 1997), the criminal statute under which Defendant was charged with the crime of "Medicaid Fraud." It provides in relevant part:

> [A] person who knowingly or intentionally ... files a Medicaid claim, including an electronic claim, in violation of Indiana Code § 12-15 ... commits Medicaid fraud, a Class D felony.

As such, we are required to examine Ind. Code § 12-15 (1993 & Supp. 1997). This article of the Code comprises Indiana's Medicaid statute. Among its provisions is the following:

> A provider who accepts payment of a claim submitted under the Medicaid program is considered to have agreed to comply with the statutes and rules governing the program.

Ind. Code § 12-15-21-1 (1993). A Medicaid regulation in effect at the time of Defendant's alleged submissions specified that providers could not be paid by Medicaid more than their "usual and customary charge" to private non-Medicaid customers. Ind. Admin. Code tit. 405 r. 1-6-21.1(g)(3)(1996 & Supp. 1997).

The State alleged that Defendant charged between $22.50 and $25.00 per 9000 milliliters to three other customers while charging the Medicaid program $181.00 per 9000 milliliters. According to the State, the resulting payments exceeded $50,000. It was the State's theory, then, that Defendant did not comply with Ind. Admin. Code tit. 405 r. 1-6-21.1(g)(3) when it overcharged the Medicaid program; that this in turn violated Ind. Code § 12-15-21-1 because Defendant did not abide by its agreement to "comply with the ... rules governing [Medicaid];" and Defendant therefore committed a class C felony under the Medicaid Fraud Statute, Ind. Code § 35-43-5-7.1(a)(1), by submitting a claim in violation of Ind. Code § 12-15.

. . . .

The penal statute at issue here, Ind. Code § 35-43-5-7.1(a)(1), it is true, cross-references Ind. Code § 12-15. But Ind. Code § 12-15 is an entire article of the Indiana Code, covering 50 pages of the 1993 Code and comprising 280 sections organized in 37 chapters. [Footnote omitted.] Many of the chapters impose duties on or otherwise speak to the state agency responsible for administering the Medicaid program. Others define the eligibility of, impose duties on, or otherwise speak to individuals who receive Medicaid assistance. Only a portion speak to Medicaid providers. The effect of the statute, then, is to say that a provider is prohibited from filing a Medicaid claim "in violation of" nothing more specific than this vast expanse of the Indiana Code. This is not, in our view, "fair warning ... in language that the common world will understand, of what the law intends to do if a certain line is passed." [Citation omitted.] . . .

We hold that the general reference Ind. Code § 12-15 in Ind. Code § 35-43-5-7.1(a)(1) is too vague in defining the conduct sought to be proscribed to meet the requirements of due process.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON and RUCKER, JJ., concurred.

BOEHM, J., filed a separate written opinion in which he concurred and in which DICKSON and RUCKER, JJ., concurred, in part, as follows:

[S]ubsection (a)(1) is not the only relevant provision under section 7.1. Healthscript was charged in the second amended information with violating Indiana Code section 35-43-5-7.1 without specifying which subsection of that section was violated. Subsection 7.1(a)(2) provides that a person who knowingly or intentionally "obtains payment from the Medicaid program under IC 12-15 by means of a false or misleading oral or written statement or other fraudulent means" commits Medicaid fraud. . . . According to the affidavit for probable cause filed with the information, Healthscript knowingly charged the Medicaid program $181 per 9000 milliliters of sterilized water while it charged private non-Medicaid customers $22.50 and $25 for the same 9000 milliliters of water. One need not have a finely tuned moral compass to know that this conduct constitutes the obtaining of payments from the Medicaid program by means of a false statement. The usual and customary charge requirement was well known in the industry. In my view, given the regulatory scheme, presenting this claim constituted a representation that the $181 price was "usual and customary." . . .

. . . .

Although I believe a violation of 7.1(a)(2) could have been charged, I concur in the majority opinion because the information did not accomplish that. The charge in the second amended information of a violation of Indiana Code section 35-43-5-7.1 was obviously not clear in alleging a violation of subsection (a)(2). The State itself focuses on Healthscript's conduct as a violation subsection (a)(1). [Footnote omitted.] . . . For these reasons, I would find that the charging information did not charge a violation of (a)(2) with sufficient clarity. [Citation omitted.] . . .

FOBAR v. VONDERAHE, No. 34S05-0204-CV-228, ___ N.E.2d ___ (Ind. July 1, 2002).

BOEHM, J.

In this marriage dissolution case, the Court of Appeals found the trial court abused its discretion and instructed the trial court to deviate from a 50-50 property division to the extent necessary to reflect the value of one spouse's inherited and non-commingled interest in property. Fobar v. Vonderahe, 756 N.E.2d 512, 523 (Ind. Ct. App. 2001). We hold that a trial court's discretion in dividing property in a dissolution is to be reviewed by considering the division as a whole, not item by item. So viewed, the trial court's 50-50 division was within its discretion.

. . . .

[T]he Court of Appeals relied principally on Castaneda v. Castaneda, 615 N.E.2d 467 (Ind. Ct. App. 1993). Castaneda held that all property of the parties must be included in the marital estate regardless of its source, but "the trial court *may* deviate" from the 50-50 statutory presumption if property was brought separately into the marriage, was never commingled with other marital assets, and was never treated as marital assets. 615 N.E.2d at 470 (emphasis added). Anthony correctly responds that Castaneda does not stand for the proposition that a trial court is required to reach an unequal division of property because one spouse brought some items separately to the marriage. Rather Castaneda permits the trial court, in its discretion, to choose to distribute the marital property unequally in favor of one spouse based on statutorily identified considerations, one of which is inherited property. Whether to do so is a matter of trial court discretion in light of all other relevant factors.

. . . .

Here, there is ample basis justifying the trial court's inclusion of Rose's interest in the Buffalo property and the equal division of the entire marital pot. Anthony has an annual income of $32,800, and Rose earns approximately $40,500. Rose was awarded Anthony's rental property that he acquired prior to the marriage. The trial court found that Rose's earning ability was "substantially more" than Anthony's and would be increased by her greater rental income after the Decree takes effect. Thus the trial court was well within its discretion in offsetting Rose's higher earning capacity and resources by including the Buffalo property in the overall 50-50 split, rather than setting it off to Rose as a separate item.

. . . .

SHEPARD, C. J. and DICKSON, RUCKER and SULLIVAN, JJ., concurred.

SONGER v. CIVITAS BANK, No. 23S01-0207-CV-360, ___ N.E.2d ___ (Ind. July 2, 2002).
SHEPARD, C. J.

Recent practice and case law has inclined toward denying a request for trial by jury whenever a complaint joins claims in law and equity on the theory that any claim in equity "draws the whole lawsuit into equity." We think this narrows the right to trial by jury as guaranteed by the Indiana Constitution.

. . . .

[I]t has long been agreed that Article I, section 20 serves to preserve the right to a jury trial only as it existed at common law. [Citations omitted.] . . . This principle is embodied in Ind. Trial Rule 38(A):

> (A) Causes triable by court and by jury. Issues of law and issues of fact in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. In case of the joinder of causes of action or defenses which, prior to said date, were of exclusive equitable jurisdiction with causes of action or defenses which, prior to said date, were designated as actions at law and triable by jury – the former shall be triable by the court, and the latter by a jury, unless waived; the trial of both may be at the same time or at different times, as the court may direct.

. . . .

Six years after Albrecht [v. C.C. Foster Lumber Co., 126 Ind. 318, 26 N.E. 157 (1890)], this Court considered a similar issue. In Field v. Brown, 146 Ind. 293, 45 N.E. 464 (1896), Field filed a three-count complaint. The first sought recovery for money, the second sought an accounting, and the third alleged fraud in settlement agreements. 146 Ind. at 294, 45 N.E. at 464. Field requested a jury trial but was denied. The Court concluded that while the last two counts stated equitable claims, the first count was triable at law by a jury. 146 Ind. at 294, 45

N.E. at 464. Relying on a statute that is now Trial Rule 38(A), the Court held that the two equitable claims did not necessarily draw the third cause of action into equity. 146 Ind. at 295-96, 45 N.E. at 464-65; see also Abernathy v. Allen, 132 Ind. 84, 31 N.E. 534 (1892) (in suit to set aside two conveyances and order partition, defendants were entitled to jury trial on issue of partition).

Nevertheless, the Field Court reaffirmed that "where equity takes jurisdiction of the essential features of a cause, it will determine the whole controversy, though there may be incidental questions of a legal nature." [Footnote omitted.] [Citation omitted.] The Court cautioned, however, that "none of [our past holdings] can be construed as holding that numerous causes of action, stated in various paragraphs of complaint, may not be severed, and those of an equitable nature tried by the court, and those of a legal character tried by a jury." [Citation omitted.]

. . . .

As such, Field's holding is that where the essential features of a suit sound in equity, the entire controversy is drawn into equity, including incidental questions of a legal nature.

The inverse must also be true. Where equity does not take jurisdiction of the essential features of a cause, a multi-count complaint may be severed, and different issues may be tried before either a jury or the court at the same proceeding. This is consistent with the language and spirit of Rule 38(A).

. . . .

Modern decisions on this topic reflect the difficulty of parsing through the issue. A fair amount of case law, including some of our own, demonstrates the risks of a shorthand, imprecise recitation of the rule. [Citation omitted.]

An overview of recent appellate decisions reveals continuing disagreement and a multitude of tests used for determining a litigant's right to jury trial. We accepted transfer to restate the basic principles.

Much of this modern inconsistency can be traced to misuse of Hiatt v. Yeargin, 152 Ind. App. 497, 284 N.E.2d 834 (1972), overruled on other grounds, Erdman v. White, 411 N.E.2d 653, 656 (Ind. Ct. App. 1980). While much of the prior case law involved interpretation of the statutory guarantee, Hiatt was the first case to consider Trial Rule 38(A) as it was adopted in 1970. [Citation omitted.] The case involved a breach of contract claim which sought specific performance of the agreement. [Citation omitted.] . . .

. . . .

After a thoughtful analysis, the court held that "[t]o determine if an action with mixed issues of fact sounds in equity or law, the court must turn to the complaint and pleadings as a whole." [Citation omitted.] The court concluded by saying that the "right to trial by jury is determined by reference to the essential character and nature of the claim for relief sought." [Citation omitted.]

Unfortunately, later decisions misconstrued Hiatt's holding, prying it loose from the rule of Towns, Hendricks, and Field. For instance, in Jones v. Marengo State Bank, the court cited Hiatt for the proposition that "if an essential part of a cause of action is equitable the rest of the case is drawn into equity." [Citation omitted.] . . .

. . . .

A review of Rule 38(A) and more than 120 years of decisions reveals that Songer is correct in arguing that the simple inclusion of an equitable claim, standing alone, does not warrant drawing an entire case into equity. Such an approach violates Rule 38(A), and we disapprove cases holding otherwise. Something more than the mere presence of an equitable claim is necessary. [Footnote omitted.]

The appropriate question is whether the essential features of the suit are equitable. To determine if equity takes jurisdiction of the essential features of a suit, we evaluate the nature of the underlying substantive claim and look beyond both the label a party affixes to

the action and the subsidiary issues that may arise within such claims. Courts must look to the substance and central character of the complaint, the rights and interests involved, and the relief demanded. In the appropriate case, the issues arising out of discovery may also be important. [Footnote omitted.]

. . . .

The crux of Songer's argument is that Civitas' desire to foreclose the lien was only "incidental" to its primary goal of "recover[ing] a monetary judgment against Appellants for the collection of certain promissory notes." [Citation to Transfer Petition omitted.] While we agree that Civitas' core objective was to regain the funds it lent, this was not through a money judgment. The purpose of count one was to establish the amount Civitas was entitled to collect out of the collateral it possessed, including interest and attorneys' fees. [Citation omitted.]

In the instant case, Civitas lent Songer $500,000 secured by CentreBank stock and real property owned by CCI. It was not a judgment lien Civitas sought, but rather court authorization to liquidate the collateral it held. It would be nonsensical for Civitas to ask for a $500,000 money judgment and then be forced to seek attachment of its judgment lien to unencumbered property when it already possessed properly attached collateral.

Instead, the essence of the claim was for a judicial pronouncement that Civitas' possessory lien was perfected and that the collateral could be liquidated. At its heart, this was a suit to foreclose a lien on property.

As we observed above, the vast weight of authority holds that foreclosure actions are essentially equitable. [Citation omitted.] [Footnote omitted.] And being essentially equitable, the whole of the claim is drawn into equity, including related legal claims and counterclaims.

. . . .

BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

COHOON v. COHOON, No. 49A04-0109-CV-400, ___ N.E.2d ___ (Ind. Ct. App. June 27, 2002).

BROOK, C. J.

On January 1, 1999, Father filed a petition for dissolution. Father and Mother then entered into a settlement agreement ("settlement agreement") in which the parties agreed that

> [a]ny dispute between the parties as to child support, custody, or visitation shall be submitted to and resolved by binding arbitration in Indiana, so long as one party remains, resides or is a resident of Indiana, within five (5) days of an arbitrator being selected, same being the intention of the parties to rapidly resolve conflicts in this interstate case.

[Citation to Brief omitted.] . . .

[M]other filed a petition for modification of the settlement agreement and a petition for a contempt citation for Father's alleged nonpayment of child support. . . . Father filed a motion to dismiss Mother's petitions alleging that the petitions were not properly before the trial court because the parties had agreed to resolve all child support disputes with binding arbitration. . . . [T]he trial court held a hearing on the contempt petition. At the hearing, Father made a continuing objection to all of the evidence presented on the ground that the contempt petition was not properly before the trial court because the issue of support should have been submitted to binding arbitration pursuant to the settlement agreement. [Citation to Transcript omitted.]

. . . The trial court's order dated, July 23, 2001, provides in part, . . .

22. The parties stipulated at the hearing that Father had on his own, without agreement of the parties, abated child support by [] 100% during extended visitation for 25 weeks resulting in father taking another visitation credit of $2,000.

. . . .

25. The parties have also stipulated that Father is otherwise current in his child support obligation but for the $2,000.00 abatement taken by father.

. . . .

1. That the Marion County Visitation Guidelines, which were in effect at the time of the parties' Agreement, allows for a 50% abatement for extended visitation of seven consecutive days or more.

. . . .

4. …. The parties clearly contemplated defraying the cost of long distance extended visitation by pro-rating the 50% abatement over a period of 52 weeks a year.

5. That Father is not entitled to a 50% abatement of support for extended visitation under the Marion County Visitation Guidelines and a weekly visitation credit if he is not exercising both types of visitation.

. . . .

13. That the provision in the parties' Agreement which states that child support, custody, or visitation issues shall be resolved by "binding arbitration" is void as against public policy in that the agreement attempts to usurp the continuing jurisdiction of the Court over the issues concerning child support modifications, contempt actions, custody, and visitation.

. . . .

[W]e note that this is a case of first impression in Indiana. We also emphasize the many advantages of mediation and non-binding arbitration as methods to resolve child support, custody, and visitation disputes. These advantages include efficiency, informality, less animosity, and caseload reduction for the trial courts. Further, we strongly encourage divorcing parents to utilize these methods to amicably resolve such disputes.

Additionally, we recognize a "'very strong presumption of enforceability of contracts that represent the freely bargained agreement of the parties.'" [Citation omitted.] However, "[w]here a properly formed agreement contravenes the public policy of Indiana … courts have traditionally said that it is void and unenforceable." [Citation omitted.]

. . . .

We are concerned that an arbitrator would not be required to follow pertinent statutory guidelines, e.g., the Indiana Child Support Guidelines, when arbitrating child support, custody, and visitation disputes. . . .

Given that the scope of judicial review of an arbitrator's award is quite limited, we are also concerned about the lack of recourse available to a parent if an arbitrator fails to follow the Child Support Guidelines. [Citations omitted.]

Moreover, we are troubled by the potential inability of trial courts to enforce dissolution orders and settlement agreements that include binding arbitration clauses. . . .

. . . .

In conclusion, while we would strongly encourage parents to amicably resolve child support, custody, and visitation disputes with mediation or non-binding arbitration, which would be subject to judicial review, settlement agreements requiring parents to resolve child support, custody, and visitation disputes with largely non-reviewable binding arbitration are inconsistent with sound public policy and are therefore void. [Footnote omitted.] . . .

. . . .

MATHIAS, J., concurred.
RILEY, J., filed a separate written opinion in which she concurred in part and in which she dissented in part, as follows:

> [I] respectfully dissent from the majority's opinion as to Issue I. It is my opinion that the trial court improperly ruled that the binding arbitration provision in Mother and Father's Agreement of Settlement was void for the reason that it is against public policy.
>
> . . . .
>
> [T]he issue of contempt did not fall within the scope of the binding arbitration provision. [Citation omitted.] . . . [T]he trial court *sua sponte* raised and ruled on the issue of whether the binding arbitration provision . . . was void. The binding arbitration provision had nothing to do with the matter before the trial court. . . .
>
> . . . .

CRIMINAL LAW ISSUES

MAPP v. STATE, No. 48S02-0108-CR-362, ___ N.E.2d ___ (Ind. June 28, 2002).
SULLIVAN, J.

> Harold Mapp pled guilty to cocaine possession and delivering charges and was sentenced to a total of twenty years. We uphold his guilty plea conviction and sentence, finding that in pleading guilty to his crimes, he waived the right to contest his guilty plea on double jeopardy grounds.
>
> . . . .
>
> The Court of Appeals, in an unpublished memorandum decision, vacated Mapp's guilty plea as to Count II. Mapp v. State, No. 48A02-0006-CR-368 (Ind. Ct. App. Feb. 15, 2001). The court reasoned that because it was clear from the face of the charging instrument that the two counts violated double jeopardy principles, the plea agreement was invalid. Id., slip op. at 6. We granted transfer. Mapp v. State, 761 N.E.2d 415 (Ind. 2001) (table).
>
> . . . .
>
> We find that Mapp waived his right to challenge his convictions on double jeopardy grounds when he entered his plea agreement. This principle was most recently affirmed in Games v. State, 743 N.E.2d 1132, 1135 (Ind. 2001). We further hold that there is no exception to this rule for "facially duplicative" charges.[2]
>
> . . . Defendants waive a whole panoply of rights by voluntarily pleading guilty. These include the right to a jury trial, the right against self-incrimination, the right of appeal, and the
> right to attack collaterally one's plea based on double jeopardy. [Citations omitted.] We see no basis for a different rule for facially duplicative charges. . . .
>
> Here, Mapp had a choice. He could either plead guilty to the two crimes with which he was charged – possession of cocaine with intent to distribute and dealing cocaine – or go to trial. In return for his guilty plea, the prosecution agreed to reduce Count I, possession with intent to deliver, from a Class A felony to a Class B felony. . . .
>
> Having granted transfer, the Court of Appeals decision is vacated pursuant to Ind. Appellate Rule 58A. The judgment of the trial court is affirmed.

[2] The Court of Appeals referred to its decision in Odom v. State, 647 N.E.2d 377 (Ind. Ct. App. 1995), trans. denied, as authority for the proposition that a plea to "facially duplicative" charges is impermissible. Odom's holding to this effect appears to reflect a misunderstanding of Menna v. New York, 423 U.S. 61, 62 (1975), which held that a defendant who has pled guilty to charges which are facially duplicative of previous convictions is entitled to challenge the resulting convictions. The charges Mapp challenges may duplicate each other but they do not duplicate "previous convictions." In any event, Menna only applies to challenges under the Double Jeopardy Clause of the Fifth Amendment; Mapp has not claimed that any federal double jeopardy violation has occurred. (Appellant's Br. at 5).

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

STATE v. DOWNEY, No. 79S05-0106-CR-314, ___ N.E.2d ___ (Ind. June 28, 2002).
SULLIVAN, J.

The Court of Appeals held that "a misdemeanor charge under the marijuana possession statute, once elevated to a Class D felony due to a prior marijuana possession conviction, should not be enhanced again under the general habitual substance offender statute." Downey, 746 N.E.2d at 378. The Court of Appeals relied heavily on this Court's decision in Ross v. State, 729 N.E.2d 113 (Ind. 2000), where we held that where a defendant's misdemeanor violation of Indiana's handgun statute was enhanced to a Class C felony because of a prior felony conviction, it was improper for the trial court to impose the enhancement contained in Indiana's general habitual offender sentencing statute.

. . . .

The proper resolution of this case requires at least a brief review of the way in which both the appellate courts and the Legislature have dealt with imposing more severe sentences than would otherwise be the case on individuals who have proven to be repeat or "habitual" criminals. . . .

The Legislature has enacted three types of statutes that impose more severe sentences than would otherwise be the case on individuals who have proven to be habitual criminals. The interrelationship of these statutes has required judicial interpretation that has, in turn, prompted the Legislature to amend the statutes.

General habitual offender statute. The first type of these statutes is the general habitual offender statute, Ind. Code § 35-50-2-8, under which a person convicted of three unrelated felonies on three separate occasions are called "habitual offenders" and can be subjected to an additional term of years beyond that imposed for the felonies.

Specialized habitual offender statutes. The second type of these statutes is more specialized. Under this type, a person convicted of a multiple number of certain closely related offenses can be subjected to an additional term of years beyond that imposed for the offenses. At issue in this case, and in several of the previous opinions of this court discussed infra, is the "habitual substance offender" statute, Ind. Code § 35-50-2-10. Here the Legislature has provided that a person convicted of three unrelated "substance offenses" on three separate occasions can be subjected to an additional term of years beyond that imposed for the offenses. Other examples of specialized habitual offender statutes are Ind. Code § 9-30-10-4 ("habitual traffic violator") and Ind. Code § 35-50-2-14 ("repeat sexual offender").

Progressive penalty statutes. The third type of these statutes is even more specialized. Under this type, the seriousness of a particular charge (with a correspondingly more severe sentence) can be elevated if the person charged has previously been convicted of a particular offense. At issue in this case, or in several of the previous opinions of this court discussed infra, are the following progressive penalty statutes:

— Ind. Code § 35-48-4-11, under which the Class A misdemeanor possession of marijuana charge can be charged as a Class D felony if the pe rson charged has a prior conviction of an offense involving marijuana.
— Ind. Code § 9-30-10-16 & 17 (formerly § 9-12-3-1 & 2), under which the Class D felony operating a motor vehicle while driving privileges suspended can be charged as a Class C felony if the person charged has a prior conviction for operating while suspended.
— Ind. Code § 9-30-5-2 & 3 (formerly § 9-11-2-2 & 3), under which the Class A misdemeanor operating a motor vehicle while intoxicated can be charged as a Class D felony if the person charged has a prior conviction for operating while intoxicated.
— Ind. Code § 35-47-2-23 (c) (2) (B), under which the Class A misdemeanor carrying a handgun without a license can be charged as a Class C felony if the person charged has been convicted of a felony within fifteen years before the date of the offense.

In a series of decisions over the last ten years, our court has held that, absent explicit legislative direction, a sentence imposed following conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized habitual offender statute. (We highlight the "absent explicit legislative direction" proviso as it is dispositive in the case before us.)

In Stanek v. State, the defendant had been convicted and sentenced under a progressive penalty statute and then that sentence had been enhanced under the general habitual offender statute. 603 N.E.2d 152 (Ind. 1992). Specifically, the defendant was charged and convicted of operating a motor vehicle while his driving privileges were suspended. This charge had been elevated to a Class C felony (from a Class D felony) because the defendant had previously been convicted of operating while suspended. The trial court then used the general habitual offender statute to increase further the sentence for the Class C felony. We held that further increase to be impermissible. We found that the Legislature's intent in creating the "discrete, separate, and independent" system for enhancing the sentences of habitual violators of traffic laws was that those sentences not "be subject to further enhancement under the general habitual offender statute." [Citation omitted.]

Freeman v. State [658 N.E.2d 68 (Ind. 1995)] and Devore v. State [657 N.E.2d 740 (Ind. 1995)] were cases where the defendants had been convicted and sentenced under a progressive penalty statute and then their sentences had been further increased under the specialized habitual offender statute for "habitual substance offenders." . . .

As this court noted in Haymaker v. State, 667 N.E.2d 1113 (Ind. 1996), after Freeman and Devore, the Legislature modified the habitual substance offender statute to provide that prior convictions for operating vehicles while intoxicated, including those where the charge had been elevated because of a prior conviction, could serve as predicate offenses for habitual substance offender enhancements. In so responding to Freeman and Devore, the Legislature made specific reference to Ind. Code § 9-30-10, the section of the code dealing with operating vehicles while intoxicated. As such, the amendment did not affect any other progressive penalty statutes.

Ross v. State was another case like Stanek where the defendant had been charged and convicted under a progressive penalty statute and then that sentence had been increased further under the general habitual offender statute. 729 N.E.2d 113 (Ind. 2000). Specifically, the defendant was convicted of carrying a handgun without a license. The charge had been elevated to a Class C felony (from a Class A misdemeanor) because the defendant had been convicted of a felony involving a handgun within the preceding 15 years. The trial court then used the general habitual offender statute to increase further the sentence for the Class C felony. Following Stanek, Freeman, and Devore, we again found that further increase to be impermissible. . . .

In the case before us today, Defendant has beencharged under a progressive penalty statute and we are asked whether the sentence for a conviction on that charge may be further increased under the specialized habitual offender statute for "habitual substance offenders." . . . The situation in this case has a charge elevated to a Class D felony (from a Class A misdemeanor) because Defendant had previously been convicted of possession of marijuana. Therefore, under the general rule, the trial court would not be able to use either the general habitual offender statute or a specialized habitual offender statute absent explicit legislative direction.

In her dissent in the Court of Appeals, Judge Robb argued that there is explicit legislative direction here and we agree with her analysis. Downey, 746 N.E.2d at 378

(Robb, J., dissenting). As noted, the specialized habitual offender statute invoked here is Ind. Code § 35-50-2-10, applicable to "habitual substance offenders." That statute, by its terms, permits a habitual substance offender enhancement to be imposed on a person convicted of three unrelated "substance offense[s]." Id. at § 10 (b). "Substance offense" is defined to include "a Class A misdemeanor or a felony in which the possession... of... drugs is a material element of the crime." Id. at § 10 (a) (2). By its specific inclusion of drug possession misdemeanors and felonies in the category of offenses that are subject to habitual substance offender enhancement, we find the Legislature intended to authorize such an enhancement notwithstanding the existence of the drug possession progressive penalty statute. This contrasts, of course, with the situations discussed in Stanek and Ross. There is no specific reference to any progressive penalty statute in the general habitual offender statute. It also contrasts with the situations discussed in Freeman and Devore where, at the time those cases were decided, there was no specific reference to the driving while intoxicated progressive penalty statute.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

AMMONS v. STATE, No. 49A05-0109-CR-398, ___ N.E.2d ___ (Ind. Ct. App. June 28, 2002).
BAILEY, J.

Under the Fourth Amendment, the inevitable discovery exception to the exclusionary rule "permits the introduction of evidence that eventually would have been located had there been no error, for in that instance 'there is no nexus sufficient to provide a taint.'" Shultz v. State, 742 N.E.2d at 965 (quoting Banks v. State, 681 N.E.2d 235, 239 (Ind. Ct. App. 1997) (quoting Nix v. Williams, 467 U.S. 431, 438 (1984))). However, the inevitable discovery exception has not been adopted as a matter of Indiana constitutional law. Shultz, 742 N.E.2d at 966 n.1. Our state supreme court has previously held that "our state constitution mandates that the evidence found as a result of [an unconstitutional] search be suppressed." Id. (quoting Brown v. State, 653 N.E.2d at 80). In light of this clear language we are not inclined to adopt the inevitable discovery rule as Indiana constitutional law. Accordingly, the inevitable discovery doctrine is not available to validate the evidence of cocaine recovered from Ammons' person as a result of Officer Stout's unjustified pat-down. [Footnote omitted.]

. . . .

NAJAM, J., concurred.
ROBB, J., concurred in the result without filing a separate written opinion.

RYBOLT v. STATE, No. 49A04-0109-CR-402, ___ N. E.2d ___ (Ind. Ct. App. June 28, 2002).
MATHIAS, J.

In Camp [v. State, 751 N.E.2d 299 (Ind. Ct. App. 2001)], a police officer observed the defendant stop his vehicle on a residential street in a high-crime area at 4:30 in the morning. Camp, 751 N.E.2d at 300. . . .

. . . Although our court declined to address the validity of the pat-down search because the evidence supported a finding that the defendant consented to it, we observed that we were "troubled by this officer's statement that he felt his routine Terry searches are justified because 'I have reason to think everybody has a weapon . . . in my profession.'" Id. We then stated that

> [u]nder this standard, every citizen would be subject to a Terry search at any time solely by virtue of that citizen's interaction with the police. Because the limitations

> on Terry searches exist to protect citizens from police intrusions on constitutionally-protected liberties, we emphasize that a police officer cannot justify a Terry search simply by asserting his status as a police officer or his experience in that profession.

[Citation omitted.] . . .

. . . .

In this case, Rybolt's vehicle was sitting in the crosswalk of an intersection, and Rybolt was unconscious in the driver's seat. Officer Brake was eventually able to rouse Rybolt by tapping repeatedly on the window of the vehicle. Brake then asked Rybolt for his driver's license, and upon attaining the license, he asked Rybolt to step out of the vehicle. Brake then immediately conducted a pat-down search on Rybolt. At the hearing on the motion to suppress, the following testimony was given:

. . . .

> OFFICER BRAKE: . . . I was still on the scene by myself. And so at that point I wanted to go ahead and pat down for officer's safety. Through my experience, I've known that people who have . . . that are in the narcotics . . . I don't want to say that narcotics field, but who deal with narcotics always seem to have some kind of weapon or something that they can use as a weapon. And I was by myself at that time. So that's why I conducted my pat down.

. . . .

[Citation to Transcript omitted.] . . .

We agree with Rybolt that a reasonable person in Officer Brake's circumstances would not have a reasonable and particularized suspicion that Rybolt was armed and dangerous. Officer Brake's reasons for justifying the pat-down search included 1) that he was the sole officer initially present at the traffic stop and 2) that he believes that individuals who use narcotics also carry weapons. Officer Brake also admitted that he almost always conducts a pat-down search when he suspects the individual has committed a drug offense.

In this case, Officer Brake was first required to awaken Rybolt before proceeding with his investigation. Rybolt made no furtive movements, and Officer Brake did not testify that Rybolt's actions made him nervous or caused him to fear for his safety. In fact, Brake stated that Rybolt was completely cooperative. Additionally, based upon his suspicion that Rybolt was under the influence of narcotics, Officer Brake could have conducted field sobriety tests on Rybolt, and had Rybolt failed those tests, Brake would have had probable cause to arrest and search him. [Citation omitted.]

Under these facts and circumstances, Officer Brake's pat-down search of Rybolt was unreasonable, and the marijuana found in his pocket as a result of that search should have been suppressed. [Footnote omitted.]

. . . .

KIRSCH, J., concurred.

BARNES, J., filed a separate written opinion in which he dissented, in part, as follows:

I respectfully dissent. I believe that the officer here had probable cause to arrest Rybolt for a misdemeanor offense, namely operating a vehicle while intoxicated ("OWI"). As such, the marijuana seized from Rybolt's pants pocket was recovered during a search incident to that arrest.

. . . .

SCARBROUGH v. STATE, No. 49A04-0109-CR-397, ___ N.E.2d ___ (Ind. Ct. App. June 28, 2002).

FRIEDLANDER, J.

> Subsection (a)(2) of IC § 35-33-1-1 provides that a warrantless arrest is legal if the arresting officer has "(2) probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit, a felony[.]" . . . Scarborough contends that subsection (a)(2) is not available here because Officer Tevebaugh's stated grounds for placing Scarborough under arrest at the time of arrest was that he had committed criminal mischief, which is a misdemeanor, not a felony. We find no Indiana case that addresses this question.
>
> After reviewing the language employed in subsection (a)(2), we conclude that Scarborough's warrantless arrest was permissible under that provision. . . . [T]he statute does *not* identify the comments made by the arresting officer at the time of the arrest or the reasons articulated by the officer as the grounds for the arrest as relevant factors in determining the legality of the warrantless arrest. Therefore, when evaluating the legality of an arrest under IC § 35-33-1-1(a), we will not examine the comments made by the arresting officer at the time of the warrantless arrest, but instead will examine the facts known to that officer, and whether those facts satisfy the criteria set forth in any of the provisions of that statute. [Citation omitted.]
>
> **. . . .**

BROOK, C. J., and SHARPNACK, J., concurred.

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